In the Supreme Court of the United States

OCTOBER TERM, 1976

Docket No. 76-815

RAMON R. APPAWORA,

Appellant,

v.

MYRON BROUGH,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF UTAH

MOTION TO DISMISS

ROBERT M. McRAE
Attorney for Appellee
370 East Fifth South
Salt Lake City, Utah 84111

INDEX

APPENDIX

AUTHORITIES

CASES:

In the Supreme Court of the United States

OCTOBER TERM, 1976

Docket No. 76-815

RAMON R. APPAWORA,

Appellant,

v.

MYRON BROUGH,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF UTAH

QUESTIONS PRESENTED

1. Where the Utah Supreme Court upheld a default judgment against appellant, did the Utah Supreme Court hold that the Uintah and Ouray Reservations no longer exist?

2. Where appellant has made a general appearance rather than a special appearance, did the District

Court have jurisdiction to hear appellant's case irrespective of appellant's status as an Indian?

STATEMENT

A short statement clarifying appellant's statement is all that is necessary.

Appellant states that the accident occurred within the exterior borders of the Indian reservation. Appellant's statement is based on an affidavit submitted to the District Court. In the two courts below respondent argued and continues to do so here that this affidavit is no more than a conclusion of law and has no foundation in the record except as an opinion. Respondent produced affidavits indicating that the road on which the accident occurred had been built, paid for, and was owned by Duchesne County. The record is void of any right-of-way granted by any Indian tribe to the county or state, yet appellant insisted that such a right-of-way existed.

It is true that appellant was served on the reservation but the deputy sheriff who served the complaint by affidavit alleged that he first secured a court order from a tribal judge granting him permission to serve appellant on the reservation. At trial he would have testified to that effect and would have presented evidence that that was the customary procedure when serving complaints on the reservation.

Appellant's statement with respect to the Utah Supreme Court's decision will be treated in the argument.

ARGUMENT

1. DID THE UTAH SUPREME COURT TERMINATE THE UINTAH AND OURAY RESERVATIONS?

Respondent does not quarrel with appellant's general statements of the law with respect to the termination of tribal reservations. It is much too late in the development of Indian law to seriously argue with appellant's position on that issue in the face of clear and concise declarations by Congress and the United States Supreme Court. Nor does respondent disagree with appellant's interpretation of the pertinent Utah and Federal statutes which require Ute tribal approval through an electoral process before the State of Utah can exercise criminal and civil jurisdiction over tribal members on reservation lands. The pertinent case law and applicable Federal statutes make it quite clear that appellant's position is unassailable. The difficulty with appellant's position is *not* its general legal soundness. The difficulty with appellant's Jurisdictional Statement is that it has no relevance to the factual setting in which this case reaches the Court.

Appellant has very carefully quoted from the Utah Supreme Court decision, *Brough v. Appawora*, Ut., 533 P.2d 934 (1976), attempting to induce one into believing that the Utah Supreme Court completely destroyed every vestige of the Uintah and Ouray Reservations in the State of Utah. Although it is perhaps possible to glean such a holding from a quick and careless reading of the case, appellant's contention is without merit.

Brough, supra, did *not* destroy anything. The case recognizes that a reservation does in fact exist, that almost a century or more ago the reservation contained a great deal more land than it does now and, finally, that the land on which the accident occurred has not been within reservation boundaries for nearly 74 years due to Acts of Congress.

In context, the quotations appellant uses indicate a very *different* holding than what appellant would have this Court believe.

> "The Ute nation, *of the long-ago treaty, no longer exists*, and the descendants of the inhabitants of that nation are now citizens of the United States. When a nation ceases to exist, its treaties are no longer of any force or effect, and the descendants of those who constituted the erstwhile nation cannot thereafter claim any benefits under the treaty. For a long time, Indians have claimed that they were not treated as citizens of this country. Now that they are citizens of the United States, some of them are unwilling to accept the responsibilities and duties which go with the privilege of citizenship.
>
> 'In the case of DeCoteau v. District Court, supra, the question was presented as to whether or not the state court had jurisdiction of Indians *within the confines of an original grant* to the Indian tribe. *There, as in the instant matter*, the government *had reduced the original* reservation *by the land not allocated* to the Indians and had paid the tribe therefor. The South Dakota Supreme Court held that the land, within the boundaries of the original treaty, which had been purchased by the government and subsequently sold

> to white men, *as was done in this case*, was no longer "Indian Country" and that the state courts had jurisdiction over Indians *therein*. This ruling was affirmed by the Supreme Court of the United States in March, 1975.
>
> 'To declare the law to be as claimed by the appellant would be to abandon all forms of due process and permit an enrolled Indian to commit crimes or torts *at will* and be immune from an accountability to the law of the land. Any statute or court decision which would prevent an enrolled Indian from being tried under the law of the land for a tort or crime committed by that Indian would be in contravention of the due process clause of the Constitution.
>
> 'To permit an Indian who commits a murder *in any of the various towns in the drainage area of the Duchesne River* to show disdain for the prosecuting officials and claim the sanctuary of the tribal method of procedure is unthinkable." (Citations omitted)

It is clear from the Utah Supreme Court's use of *DeCoteau v. District County Court*, 420 U.S. 425, 43 L.Ed 2d 300, 95 S. Ct. 1082 (1975) that it was *not* eliminating the Ute reservations. It simply held that an Indian cannot do anything he pleases within the old reservation's boundaries and claim immunity from state jurisdiction. The case holds that if a tribal member wishes to claim immunity, he must claim immunity for actions committed on *tribal* land and not on *state* land.

Appellant's entire premise is faulty, not because it is wrong as a statement of general principals of law

but because *Brough* does not hold for the proposition that appellant contents. Perhaps as a technical matter, appellant's appeal should be denied for that reason alone since appellant is seeking jurisdiction of a question that is not raised by this case, but the *Brough* case is also sound on legal principals and the appeal should be denied on that basis as well.

At Appendices I and J of appellant's Jurisdictional Statement, appellant cites the Act of Congress and Presidential Proclamation which opened portions of the Uintah and Ouray reservations for homesteading whereby the government sold much of the unallocated land to non-Indian settlers. Both documents contain the statement that unallocated lands "shall be restored to the public domain." The original Act of Congress indicates that the allotment and payment of moneys for claims raised by the Ute Indians with respect to lands already allotted to others and the restoration of unallocated land to the public domain was to be done with the consent of a majority of the adult male Indians of the tribes involved. One month after the approval of this Act, on June 19, 1902, (Appendix A, Respondent's Brief) consent was eliminated with respect to the payment of moneys. No document appears acknowledging that the Indians consented, but history clearly indicates that the allotments were made to the tribes and that by Presidential Proclamation the unallocated lands were returned to the public domain, as Appendix J of appellant's Jurisdictional Statement indicates.

For 74 years no one, including the Ute tribes, has questioned the ownership of the unallocated lands. The

lands were sold and treated as the exclusive property of the United States. The United States sold the property giving patent title to tracts which have been treated as fee simple ownership and incorporated cites and body politic counties of the area have treated the land in all respects as their own. Trust deeds were not issued.

The May 27, 1902 Act did not specify how the Indian peoples were to consent, and the Presidential Proclamation of 1905 indicates that the government delayed almost two years before opening the unallocated land. No reason appears in the record for the delay nor why a specific manner of consent was not required. But after 74 years of silence while the various Ute bands were proceeding with claims on other tracts of land, respondent contends that the Indians consented to this Act of Congress. This argument was made to the Utah Supreme Court and Respondent contends that it is still a valid argument.

This case is very similar to *The Confederated Bands of Ute Indians v. The United States*, 100 Ct. Cl. 413 (1943). There the Court of Claims reached the conclusion that the United States and the Ute tribes had *actually reached an agreement* about the tribe's lands in the State of Colorado. On that basis, the government was required to pay the tribes for the land the government confiscated as per the agreement. In the case at bar the Act of 1902 essentially provides for the same remedy. Congress offered to pay for the land. The only difference in the case at bar is that there is no history of an actual agreement between the

parties. Respondent contends, however, that an agreement was reached by silence and acquiescence over a period of seventy-four years and therefore the Ute Tribe should now by laches and estoppel be barred under basic equitable principles.

However, if respondent is incorrect as to the issue of agreement, it is clear that by Presidential Proclamation of 1905 the unallocated lands were in fact returned to the public domain as the very language of the Proclamation states. Clearly, the very purpose of the proclamation was to implement and carry out the purposes of the May 27, 1902 Act of Congress. Furthermore, whether an agreement existed or not the land was taken and sold. In accordance with appellant's own case law, the clear intention of Congress and action of the President was, in fact, to terminate the reservation in the unallocated lands. No case law is presented by appellant requiring that Indians consent to a termination of a reservation or a part of a reservation. All the case law requires is a clear intention of Congress as is clearly pointed out in appellant's brief. Apparently, Congress, under statute and case law, can create a reservation and can dispose of one without the consent of anyone. That statement was never questioned in *The Confederated Band of Ute Indian*, supra. Implicitly the Court of Claims agreed that such was the law, but decided against the government because the government acted as if it did not have complete title.

Once again this case does not involve the issues appellant raised in his Jurisdictional Statement and the appeal should be denied for that reason.

Finally, it should be brought to the Court's attention that a suit is now pending in the United States District Court in the State of Utah, Civil Number C-75-408 entitled *The Ute Indian Tribe v. The State of Utah; Duchesne County; Roosevelt City; Duchesne City*, in which the Ute tribe is seeking a declaratory judgment allowing it to implement tribal laws in the entire old reservation boundaries (See Appendix B). It is apparent that the remedy the tribe is seeking through the same counsel afforded appellant in this case is to have its old land under the original reservation given back to the tribe and that the tribe be allowed to assume jurisdiction of all peoples, towns, establishments, etc., within those old limits, both Indian and non-Indian. Serious and critical questions are to be decided in the U.S. District Court case which will not even be discussed in the case at bar, yet a determination of the issues in this case in the posture in which appellant approaches the Court will prejudice the rights of countless people. Respondent respectfully urges the Court to deny the appellant's petition because that petition does not raise issues that are fairly raised by the circumstances of this case and because the issue is not ripe for determination at this time and should be left to a determination in a case such as that now pending before the U. S. District Court in the State of Utah.

2. DID THE DISTRICT COURT HAVE JURISDICTION OVER APPELLANT?

At page five (5) of appellant's Jurisdictional Statement appellant writes:

> "Thereafter, Appawora obtained counsel and made a timely motion to the county district court to set aside the default judgment and to dismiss the action on the grounds that the county district court lacked jurisdiction over both himself and *the subject matter of the action*, and that the judgment entered was, therefore, void. (Emphasis added.)

Appendix C of respondent's brief also indicates that before the District Court below, appellant moved to dismiss the case on the same grounds. It is a general principle of law that when a party attacks both the in personam *and* subject matter jurisdiction of the court that party has entered a general appearance and not a special appearance. See 31 A.L.R. 2d 268, Section 5 and cases cited therein.

In view of this case law it is clear that irrespective of the determination of the status of the Uintah and Ouray Reservations, appellant, in fact, entered a general appearance and subjected himself to the jurisdiction of the lower court. This argument was raised before both lower courts and respondent contends that it should be dispositive of this case. Since appellant entered a general appearance arguing strenuously before the District Court that it lacked subject matter jurisdiction, appellant cannot now claim immunity as a tribal member and respondent respectfully moves the court to dismiss this appeal.

CONCLUSION

The decision of the Utah Supreme Court did not terminate the Uintah and Ouray Reservations but is

consistent with pertinent case law dealing with Indian problems. Furthermore, appellant entered a general appearance before the District Court and irrespective of the need to determine the boundary lines of the reservations in this case, appellant was subject to the District Court's jurisdiction under the particular circumstances of this case.

Respectfully submitted,

ROBERT M. McRAE
Attorney for Appellee
370 East Fifth South
Salt Lake City, Utah 84111

CERTIFICATE OF MAILING

This is to certify that I mailed two copies of the foregoing Motion by first class mail, postage prepaid, to Scott C. Pugsley of Boyden, Kennedy, Romney & Howard, Attorneys for Appellant, 1000 Kennecott Building, Salt Lake City, Utah 84133, and to the Solicitor General, Department of Justice, Washington, D.C. 20530, this 7th day of February, 1977.

.....

ROBERT M. McRAE

APPENDIX A

ACT OF JUNE 19, 1902 (32 State. 31.)

AN ACT

JOINT RESOLUTION SUPPLEMENTING AND MODIFYING CERTAIN PROVISIONS OF THE INDIAN APPROPRIATION ACT FOR THE YEAR ENDING JUNE THIRTIETH, NINETEEN HUNDRED AND THREE.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of the Act "Making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, nineteen hundred and three, and for other purposes, "are hereby supplemented and modified as follows: . . ."

The item of seventy thousand and sixty-four dollars and forty-eight cents appropriated by the Act which is hereby supplemented and modified, to be paid to the Uintah and White River tribes of Ute Indians in satisfaction of certain claims named in said Act, shall be paid to the Indians entitled thereto without awaiting their action upon the proposed allotment in severalty of lands in that reservation and the restoration of the surplus lands to the public domain.

Approved, June 19, 1902.

APPENDX B

VERNAL EXPRESS/ADVERTISER, PAGE 25

THURSDAY, NOVEMBER 20, 1975

"UTE TRIBE TO TEST LAW CODE RIGHTS IN COURT"

"With feelings running high on both sides, a federal court test is ahead for an Indian tribe's attempt to assert jurisdiction over non-Indian individuals and towns.

Despite tension and resentment raised by the issue, there have been no major incidents.

The area in which the Ute Tribe wants to apply tribal laws includes the towns of Duchesne, Roosevelt, Myton, Neola and Altamont. They have a combined population of about 4,000 and are surrounded by the 1.3 million-acre Uintah and Ouray Indian Reservation.

'We will no longer stand idly by and watch our resources ruined, our people humiliated and our competency questioned,' Tribal Chairman Lester Chapoose has said.

The 1,600-member tribe says if state officials can prosecute Indians who violate state laws off the reservation, the Utes can prosecute non-Indians who violate Ute laws on or affecting the reservation. A tribal code claiming civil and criminal jurisdiction over all lands, including exterior boundaries of the reservation, went into effect September 15.

And Indian tribes in two other states are formulating similar law enforcement plans. In Montana the Blackfeet have drafted an ordinance of their own under which they would arrest and prosecute non-Indians for violations committed on their reservations near Glacier National Park. So far, all the Blackfeet have done is issue two traffic citations.

Similar efforts have been started in Washington State.

State and local officials in Utah say the Utes have no jurisdiction in communities which were carved out of the reservation years ago under homestead and townsite acts. The Indians were paid $32 million for the land in one of the first cases to come before the U.S. Indian Court of Claims after it was established in 1948.

'We will not tolerate a government by nonrepresentation,' State Senator Dan Dennis of Roosevelt said, referring to the tribe's leaders. 'We are guaranteed a representative government by the Fifth Amendment. If we have to, we'll go to Congress and change the law.'

The tribe has not been pressing implementation of some of the code's provisions that are more objectionable to whites because, in the words of one tribal spokesman, 'We feel it's better to exercise restraint in times of stress."

An example is the decision, at least for the time being, not to patrol Roosevelt, Duchesne, Myton or U. S. 40 and make arrests or issue citations. But county

roads connecting Indian communities are patroled by Indian officers.

Other areas in which Indian plans for jurisdiction have raised objections are arrests and prosecution in tribal courts of whites or Indians for criminal matters in which Indians are involved, as well as trying civil matters that meet similar criteria An ordinance in which commercial alcoholic beverage operations would be licensed by the tribe also is expected to become an issues once the tribe completes the ordinance."

APPENDIX C

MYRON BROUGH,

Plaintiff,

vs.

RAMON R. APPAWORA,

Defendant.

SPECIAL APPEARANCE AND MOTION TO SET ASIDE DEFAULT AND DEFAULT JUDGMENT AND TO DISMISS

Case No. .....

COMES NOW the Defendant, appearing specially through counsel, and, pursuant to Rules 55(c) and 60(b) of the Utah Rules of Civil Procedure, moves the Court to set aside the default and default judgment entered herein and dismiss Plaintiff's Complaint.

As grounds for this Motion, Defendant states that this Court lacks jurisdiction over both the Defendant and the subject matter and that the judgment herein is therefore void.

A Memorandum and supporting affidavits in support of this Motion are attached hereto.

This Motion shall be handled according to Rule 20 of the Rules of Practice of this Court.

Respectfully submitted this 22nd day of October, 1975.

BOYDEN, KENNEDY,
ROMNEY & HOWARD
BY: SCOTT C. PUGSLEY
Attorney for Defendant
1000 Kennecott Building
Salt Lake City, Utah 84133